BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK A. BIRCHMEIER	)	
Claimant	)	
	)	
VS.	)	
	)	Docket No. 1,000,095
IBP, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals from the May 9, 2003 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

Issues

Judge Avery found "Claimant did not suffer an accidental injury. Claimant's alleged accidental injury did not arise out of and in the course of employment. Notice was not given within 10 days." [1] Accordingly, preliminary benefits were denied. However, Judge Avery went on to find that: "Claimant's symptoms stemmed from his slip and fall accident. He may be eligible for post award medical treatment." [2] Claimant disputes those findings and seeks Appeals Board (Board) review of whether claimant suffered personal injury by accident arising out of and in the course of his employment, whether notice was given within ten days and, if not, whether just cause exists for extending the time for giving notice. Respondent raises an additional issue concerning whether claimant made timely written claim. These issues are considered jurisdictional and are subject to review by the

[1] Order at 1.

[2] *Id*. Claimant filed a separate claim for a January 17, 2001 slip and fall accident. An Agreed Award was signed by Judge Avery on December 27, 2002, in that docketed claim number 264,222.

Board on an appeal from a preliminary hearing Order. [3] Respondent also disputes the allegation of a series of accidents ending February 1, 2001. Date of accident, by itself, is not jurisdictional, but will be addressed to the extent necessary to decide the jurisdictional issues. [4]

Findings of Fact and Conclusions of Law

Claimant alleges he "injured both arms, shoulders, neck, hands, and associated body parts" by a "series of accidents from 1-5-99 to 2-1-01" by "Repetitive work activities using upper extremities in course of employment." [5] Claimant began working for respondent on May 12, 1994, and last worked his regular job for respondent on or about February 1, 2001. Claimant's position is that he gave notice within ten days as required by K.S.A. 44-520. In the alternative, he is also alleging that there is just cause for his failure to give notice within ten days so as to extend the time for giving notice to 75 days. And claimant points to the medical records as also satisfying the requirements for notice and written claim. Respondent alleges that it did not know of claimant's alleged injuries in this case until August 2001 when it received a letter from Dr. MacMillan, and did not have a written claim for compensation until it received a letter from claimant's attorney dated October 15, 2001. Claimant's Application for Hearing was received by the Division of Workers Compensation on October 18, 2001.

Claimant attributes his injuries to his work activities throughout his period of employment, including specific incidents using a jackhammer and while working outside in cold weather. But claimant never asked respondent to provide him medical treatment before the January 2001 slip and fall accident. Likewise, before the January 17, 2001 accident, claimant's job duties did not change over the course of his employment due to injuries, nor did claimant ever ask respondent for a change of duties or for lighter work. When he first sought medical treatment with the dispensary following his January 17, 2001 accident, his complaints were limited to his left upper extremity. He was sent to Dr. Jeffrey T. MacMillan on March 27, 2001. At that time, claimant complained to Dr. MacMillan of left shoulder pain and left hand numbness which he attributed to the slip and fall accident. [6] Dr. MacMillan diagnosed left shoulder impingement syndrome and left carpal tunnel

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[3] K.S.A. 44-534(a)(2) and K.S.A. 44-551(b)(1).

[4] Whether claimant injured his bi-lateral upper extremities in the admitted January 17, 2001 slip and fall accident is the subject of a separate claim and, therefore, is not before the Board in this appeal.

[5] K-WC E-1 Application for Hearing (filed Oct. 18, 2001).

[6] P.H. Trans. Cl. Ex. 4 (March 27, 2001 office note of Dr. MacMillan).

syndrome. When claimant returned to Dr. MacMillan on August 9, 2001, he reported a sudden worsening of his pain and numbness in both hands.

Respondent acknowledges that claimant was injured on January 17, 2001, and that claimant injured his left upper extremity in that accident. But respondent denies claimant suffered separate repetitive use injuries apart from that specific traumatic event. Both of the supervisors who testified at the preliminary hearing, Patrick Costello and Ron Kelsheimer, said that they were unaware of any other work-related injuries.

Patrick Thomas Costello testified that he is the facility manager at PBX Truck Shop for the respondent company. He said employees are instructed to report all accidents immediately to their supervisors. He recalled an occasion in the summer of 2000 when claimant was operating a jackhammer, but said claimant never mentioned a hand injury to him. If claimant had mentioned having pain, numbness or tingling in his hands, Mr. Costello would have told him to go to the dispensary and visit with a nurse. He also would have filled out an accident report. That is the respondent's standard protocol. In fact, when claimant came to him on January 17, 2001, and said he slipped on the ice, Mr. Costello told claimant to go to the dispensary. Mr. Costello also recalled claimant working on the shell wagon outside. But again, claimant did not report injuring his hands. He was unaware of any occasion when claimant suffered frostbite.

Ron E. Kelsheimer is also a manager for respondent and worked with claimant. Mr. Kelsheimer recalled a time when he and claimant were working with a jackhammer but he remembered it as being in the spring of 2000 as opposed to summer. He was never made aware claimant was having any hand problems. Nor was he aware of any occasion when claimant suffered frostbite. Claimant never reported a work-related injury to him. He likewise testified that whenever a work injury is reported, an accident report would be filled out and the worker would be taken to the dispensary.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends. [7] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." [8] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.

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[7] K.S.A. 44-501(a); *Chandler v. Central Oil Corp*., 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[8] K.S.A. 44-508(g); *see also In Re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports claimant's contention that he injured his bilateral upper extremities at work, but fails to support claimant's contention that he timely reported a work-related accident or injury to a supervisor. Claimant also did not give notice within 75 days of February 1, 2001, the last day he performed his regular work duties. Nor did the medical records from the treatment claimant received for the January 17, 2001 accident put respondent on notice of a separate work-related series of accidents within 75 days of February 1, 2001. The medical records generated within that time frame do not establish that there was a separate trauma or series of accidents. Furthermore, respondent did not have actual knowledge of a work-related accident or injury other than the accident of January 17, 2001. Therefore, the Administrative Law Judge's decision to deny preliminary benefits should be affirmed. This finding of no timely notice as required by K.S.A. 44-520 renders the remaining issues moot.

As provided by the Act, preliminary hearing findings are subject to modification upon a full hearing on the claim.

WHEREFORE, the Order entered by Administrative Law Judge Brad E. Avery on May 9, 2003 is hereby affirmed and benefits are denied.

IT IS SO ORDERED.

Dated this _____day of August 2003.

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director